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No. 72-503

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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1972

HARRIS TRUST AND SAVINGS BANK, individually, as Executor of the Estate of Gertrude Witbeck Hanlin and as Trustee; EVELYN P. GRICE, MARY T. GARVEY, JOHN A. LOWELL, II, BONNIE TORREY BERTKE, CLARENCE T. TORREY, JR. and MARGARET TORREY McGRATH,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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The instant petition for Writ of Certiorari is grounded upon violation of the due process clause of the Fifth Amendment.

Petitioners, the taxpayers, claim that they have been denied "due process of law" in that in this highly technical tax litigation they have been denied a hearing and there

has been no finding with respect to the question of the valuation of the taxed property. With this position the Solicitor General agrees! Government's Brief, first sentence, p. 12 which reads: **"The District Court did not reach the question of valuation."** (Emphasis ours).

While it is quite true that the technical tax issues (except for the *Bosch* issue) involved in this litigation do not warrant review by this Court, nevertheless the denial of due process whether it be in criminal cases or in highly technical tax litigation is, we submit, of paramount importance. That importance is highlighted because the violation is admitted by the Government. No question in our judicial system is of more importance. Indeed the Government's handling of the litigation created the violation.

The Solicitor General's statement that the denial of due process resulted from the taxpayers' " . . . own litigating strategy" is shocking. (Government's Brief, last sentence, p. 13). Not only does the Government urge that taxpayers are not entitled to a hearing on valuation, but, in addition, they seek refuge in the position that the Department of Justice succeeded in trapping the taxpayers into a stipulation from which the Government has withdrawn and with regard to which withdrawal the trial court ". . . took no action." (Government's Brief, para. 2, p. 8 next to last line). The attorneys for the Tax Division completely ignore the factual error made by the Seventh Circuit in its affirmance of the trial court's striking of not only the supporting affidavit of taxpayers' real estate expert but also in effect its striking of the Government's stipulation. The facts to which the Government stipulated form the basis for a determination with respect to the value of the assessed

property. The Government has without any justification whatsoever withdrawn from the stipulation. The stipulated facts by themselves even without the affidavit of taxpayers' real estate expert override, negate, remove and eliminate the so-called presumptive correctness of the IRS's determination of value.

On the one hand the Government stipulated to facts bearing upon valuation, however, having won the threshold issue of includability, they now retreat from that stipulation. The Government seeks to have the Court bind it and taxpayers only to that part of the stipulation bearing on the fact that an assessment was made and is, therefore, presumptively correct. The Government having succeeded on the threshold issue of includability now seeks to eliminate from the stipulation the agreed to evidence bearing on valuation which agreed to evidence, by law, overrides that elusive presumption of correctness upon which all IRS assessments ride.

In summary, the trial court found that the assessed interest was not includable in the decedent's estate for estate purposes. Having so found it was not necessary for it to nor did it reach the question of valuation. The Seventh Circuit ruled against taxpayers and for the Government on the issue of includability and like the trial court never reached the question of valuation. The taxpayers are entitled, under the due process clause, to a hearing not only with regard to *includability* but also with regard to *valuation*. The Government, having succeeded on the threshold issue, is now urging that taxpayers are foreclosed from their hearing on the ultimate issue. The Government's Brief completely fails to explain why. There is no explanation.

CONCLUSION

The underlying tax questions (except the *Bosch* question) presented in the instant case are unimportant, other than to those affected, and, therefore, do not warrant review by this Court. However, the cavalier position taken by the Solicitor General with regard to the due process issue which position was adopted by the Seventh Circuit is of paramount importance and not only warrants but requires review.

We respectfully pray that this Court grant *certiorari.*

Respectfully submitted,

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